A **SANG LEE COMPANY SDN BHD**

v.

SUBURAMANIAM MAYAWAN & ORS

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-1370-2009]
C 7 OCTOBER 2010

CONTRACT: *Oral agreement - Proof of - Plaintiffs' claim of right to harvest oil palm fruits on estate land denied by defendant owner - Whether sufficient evidence of such oral agreement existed*

D ***EVIDENCE:*** *Adverse inference - Failure to call material witness - Whether presumption arose*

The plaintiffs, collectively as a partnership, brought this action against the defendant company in the High Court for breach of an
E oral contract and for damages. The plaintiffs claimed that, at first, one Tan Tuan Kim ('TTK'), a director of the defendant had approached PW1, the main witness for the plaintiffs, to tap and collect latex from old rubber trees in the defendant's 480 acres of estate land before they were to be felled and replaced with oil palm
F trees. In return thereof, the plaintiffs were to make a cash payment of RM10,000 per month. The plaintiffs agreed to the offer and did the needful. It transpired that the defendant subsequently cut down the old rubber trees to make way for the oil palm cultivation as planned and planted oil palm seedlings on 240 acres of the estate
G land. Some of the young oil palms planted were destroyed by wild boars. It was claimed that TTK then approached PW1 to plant oil palms in the remaining areas of the defendant's estate and in those areas destroyed by the wild boars. Also, to undertake such further services as weeding, manuring, and maintenance of the trees in the
H entire 480 acres of the estate land for a period of ten years. In return thereof, the plaintiffs would be given the right to harvest the fruits of the oil palms during the ten-year period. After the ten-year period, the plaintiffs would have to surrender the trees back to the defendant. PW1 had agreed to the oral agreement but requested for
I a written one to which TTK assured to give in due course. PW1 was then asked to commence work immediately which he did and

he had expended money to that effect. It was said that PW1 had reminded TTK many times about the written agreement but was always given some assurance. Nevertheless, as the earlier oral agreement pertaining to the rubber trees were honoured by TTK, PW1 continued with the works on the estate land. PW1 claimed that TTK visited the estate many times a month to check on the work carried out by PW1 before he ceased coming to the estate. As the written agreement appeared not forthcoming, PW1 then approached DW1, the executive director of the defendant but was given the cold shoulder. PW1 then went to the defendant's headquarters but was also not entertained. He then stopped all work on the estate land and commenced this action against the defendant for reimbursement of expenses incurred in carrying out the works in the estate as contractually agreed. The defendant denied the existence of any contract with the plaintiffs and claimed that it had engaged other contractors, *ie*, one Ng Boon Geok ('NBG') and one Tan Leng Seong ('TLS') to do the necessary work on the entire 480 acres of estate land. The trial judge ruled that there was an oral contract between the parties and that there was a breach of that oral contract. The defendant now appealed.

Held (allowing the appeal) (majority)
Per Low Hop Bing JCA (Zaharah Ibrahim JCA concurring):

(1) The plaintiffs' evidence of payments to TTK of the so-called payments of RM10,000 per month for a period of four to five years was not supported by a single document or receipt. The plaintiffs' also did not call TTK as their witness. The payments were of considerable sums and should have been evidenced by receipts. There being no single document or receipt to support such payments, the probability of the plaintiffs' evidence was doubtful or illusory. (para 14)

(2) There were other contractors doing oil palm replanting works, purchase of seedlings, manuring, etc. during the period the plaintiffs were making their claim. Further, PW1 did admit that he did not have any contractual arrangements with the defendant and that he was actually instructed by the other contractors to do the work. That evidence corroborated the testimony of DW1 and DW2 that the replanting works had been contracted to other persons and not to the plaintiffs, who were at best sub-contractors. (paras 16, 17, 18 & 19)

(3) When PW1 approached DW1 for the first time during the latter's fishing trip, DW1 told him that the defendant had no dealings with the plaintiffs. Also, PW2 engaged by PW1 to do earth moving works in the defendant's estate, admitted that one Ah Seng was the main contractor and that Ah Seng took care of the estate and that Ah Seng was the person whom the plaintiffs had to deal with. In addition, PW2 issued three bills at the behest of PW1 in order to tender in court for the ad hoc purpose of the court proceedings. There was clearly insufficient appreciation by the trial judge of the evidence adduced before him. It followed that the trial judge erred in his findings that there was an oral agreement between the plaintiffs and the defendant when the probability of the evidence adduced did not support such a finding. (paras 20-24 & 28)

[Plaintiffs' claim dismissed with costs of RM5,000. Deposit refunded to defendant.]

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) The trial judge was correct in his ruling that there was an oral contract formed between the plaintiffs (through PW1) and the defendant (through DW1). The trial judge had the opportunity of observing the demeanour of the witnesses. He found PW1 to be a credible witness and gave reasons for his findings which should not be disturbed. His findings were not against the weight of evidence or in anyway perverse. (para 56)

(2) The trial judge was correct in his finding that the evidence of PW1 was corroborated by PW2 who was engaged to do works on the defendant's estate by PW1 after the oral agreement. The trial judge also appropriately made a finding that there was documentary evidence that PW1 had expended money to carry out the works under the oral agreement. The trial judge was correct in invoking the presumption under s. 114(g) of the Evidence Act 1950 by reason of the defendant's failure to call TTK, its director at the material time, to give evidence. There was no explanation in the defendant's evidence as to why TTK was not called to testify. TTK was clearly the defendant's material witness whose evidence was crucial to the defendant. (paras 57-59)

(3) The contractors claimed by DW1 to have been engaged to carry out the replanting works were never called as witnesses for the defence. When cross-examined about the oral agreement, DW1's answers were arrogant, irresponsible and evasive. (para 60)

(4) The trial judge was right in NOT giving much weight to the evidence of DW2 or to the documentary evidence adduced by him for the following reasons: (a) there was no evidence that DW2 ever visited the defendant's estate; (b) DW2 never met PW1, TLS or NBG; (c) DW2 was in no position to confirm that TLS or NBG were the defendant's contractors or that they in fact existed; (d) DW2 personally made no payment to TLS or NBG nor issued any vouchers authorizing payments to either of them; and (e) DW2 appeared to have implicitly admitted in cross-examination that there were irregularities in his handling of the financial matters of the defendant with regard to monies handed to TTK for payments to contractors. (para 62)

(5) The evidence adduced by DW2 was not of probative value since TTK, TLS and NBG were never called as witnesses by the defendant to explain exactly what role they played and whether they received the monies allegedly paid out by DW2. (para 62)

(6) On the facts of the case, the trial judge correctly held that the oral contract TTK made with PW1, as a matter of law, bound the defendant in view of TTK's position as the defendant's director and the role TTK played in the management of the defendant's estate. The rule in *Turquand*'s case protected outsiders dealing with a company in good faith. They were entitled to assume that acts within the constitution and powers of the company had been properly performed and were not bound to inquire whether acts of internal management had been regular. In the instant case, the outsider was PW1 and he had been dealing with TTK as the defendant's director in good faith. (para 64)

(7) The defendant's presentation of PW1's evidence to show that PW1 had taken instructions and worked for other contractors was misleading. The evidence adduced was selective. PW1's other evidence must be taken into consideration. When PW1 in cross-examination said that he did not have any agreement with the defendant, he meant that he did not have a written

agreement as one must appreciate that PW1 was consistent throughout his stand that there was an oral agreement between him (on behalf of the plaintiffs) and TTK (on behalf of the defendant). (paras 67 & 69)

(8) As to the vagueness and incapability of the oral agreement to constitute a valid contract, PW1's evidence showed that the terms of the oral agreement were quite clear and capable of constituting a valid contract under the Contracts Act 1950. The obligations on the part of the plaintiffs were: (a) to plant oil palms on 240 acres of the estate; (b) to replant oil palms that had been destroyed by wild boars in the other 240 acres of the estate; (c) to carry out maintenance works (including weeding and manuring) in the entire 480 acres of the estate; (d) to bear the expenses incurred for the aforesaid works; (e) to surrender the oil palms to the defendant after the ten-year period; and (f) to carry out the works immediately. The obligations on the part of the defendant were to give the plaintiffs the right to harvest the fruits of the oil palms on the entire 480 acres of the estate for a period of ten years in return for the services rendered by the plaintiffs to the defendant and to prepare a written agreement as soon as possible. (para 70)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif, bertindak secara kolektif sebagai satu perkongsian, telah membawa tindakan ini terhadap syarikat defendan di Mahkamah Tinggi kerana pelanggaran kontrak dan bagi mendapatkan gantirugi. Plaintif-plaintif mendakwa bahawa, pada mulanya, seorang Tan Tuan Kim ('TTK'), seorang pengarah defendan, telah menemui PW1, saksi utama plaintif-plaintif, untuk menoreh dan mengumpul getah dari pokok-pokok getah tua di ladang getah defendan seluas 480 ekar sebelum pokok-pokok tersebut ditebang dan digantikan dengan pokok-pokok kelapa sawit. Sebagai balasannya, plaintif-plaintif akan membayar RM10,000 sebulan tunai. Plaintif-plaintif bersetuju dengan tawaran dan melakukan apa yang seperlunya. Apa yang berlaku selepas itu adalah bahawa defendan telah menebang pokok-pokok getah tersebut seperti yang dirancang dan telah menanam benih-benih sawit di tapak seluas 240 ekar dari ladangnya. Apapun sebahagian dari anak-anak sawit tersebut telah dirosakkan oleh babi hutan. Ianya didakwa bahawa TTK kemudian menemui PW1 untuk menanam anak-anak sawit di kawasan ladang yang belum ditanam sawit serta di kawasan-kawasan yang dirosakkan

oleh babi hutan. Dan juga untuk mengendalikan kerja-kerja lain seperti membersih, membaja dan menjaga pokok-pokok di keseluruhan 480 ekar tanah ladang tersebut bagi tempoh 10 tahun. Sebagai balasan bagi semua itu, plaintif-plaintif akan diberi hak untuk menuai buah-buah sawit dalam tempoh 10 tahun tersebut. Plaintif-plaintif bagaimanapun perlu menyerahkan kembali pokok-pokok sawit kepada defendan selepas tempoh tamat. PW1 bersetuju dengan perjanjian lisan namun telah meminta satu perjanjian tulisan yang mana dipersetujui oleh TTK yang berjanji akan menyediakan perjanjian bertulis itu nanti. PW1 kemudian diminta untuk terus memulakan kerja yang mana dipatuhi oleh PW1 dengan mengeluarkan perbelanjaan-perbelanjaan untuk tujuan tersebut. Ianya didakwa bahawa PW1 telah banyak kali mengingatkan TTK mengenai perjanjian bertulis dan setiap kali telah diberikan akujanji oleh TTK untuk menyediakannya. Walau apapun, oleh kerana perjanjian lisan terdahulu mengenai pokok-pokok getah telah dipenuhi oleh TTK, maka PW1 meneruskan dengan kerja-kerjanya di tapak ladang. PW1 mendakwa bahawa TTK telah melawat ladang beberapa kali sebulan untuk memeriksa kerja-kerjanya sebelum terus menghentikan lawatan-lawatan tersebut. Disebabkan perjanjian bertulis kelihatannya tidak menjadi kenyataan, PW1 kemudian telah menemui DW1, pengarah eksekutif defendan tetapi telah tidak dilayan oleh DW1. PW1 kemudian pergi ke ibu pejabat defendan, namun masih tidak dilayan. Beliau kemudian memberhentikan segala kerja-kerjanya di tapak ladang dan memulakan tindakan ini terhadap defendan bagi menggantirugi segala perbelanjaannya dalam menjalankan kerja-kerja di tapak ladang seperti yang dipersetujui dalam kontrak. Defendan menolak kewujudan sebarang kontrak dengan plaintif-plaintif dan mendakwa bahawa ia telah mengambil kontraktor-kontraktor lain, iaitu seorang Ng Boon Geok ('NBG') dan seorang Tan Leng Seong ('TLS') bagi menjalankan keseluruhan kerja di kawasan 480 tapak ladang. Hakim bicara memutuskan bahawa terdapat suatu kontrak lisan di antara pihak-pihak dan bahawa berlaku pelanggaran terhadap kontrak lisan tersebut. Defendan kini merayu.

Diputuskan (membenarkan rayuan) (majoriti)
Oleh Low Hop Bing HMR (Zaharah Ibrahim HMR menyetujui):

(1) Keterangan plaintif-plaintif mengenai apa yang dipanggil pembayaran RM10,000 sebulan untuk tempoh empat hingga lima tahun kepada TTK tidak disokong oleh satu dokumen atau resit pun. Plaintif-plaintif juga tidak memanggil TTK

sebagai saksi. Bayaran tersebut adalah satu bayaran yang besar dan seharusnya disokong oleh resit-resit. Dengan tidak terdapatnya sebarang dokumen atau resit bagi menyokong pembayaran itu, maka kemungkinan keterangan plaintif-plaintif adalah diragui dan ilusori.

(2) Terdapat kontraktor-kontraktor lain yang melakukan kerja-kerja penanaman semula sawit, pembelian benih-benih, pembajaan dll dalam tempoh plaintif-plaintif membuat tuntutan mereka. Selain itu, PW1 mengakui bahawa beliau tidak ada apa-apa perhubungan kontrak dengan defendan dan bahawa beliau sebenarnya diarahkan oleh kontraktor-kontraktor lain untuk membuat kerja-kerjanya. Keterangan tersebut telah disokong oleh testimoni DW1 dan DW2 bahawa kerja-kerja penanaman semula telah dikontrakkan kepada orang lain dan bukannya plaintif-plaintif yang, dalam kedudukan mereka yang terbaik pun, hanya merupakan sub-kontraktor.

(3) Apabila PW1 menemui DW1 untuk pertama kali semasa pihak terkemudian tersebut pergi memancing, DW1 telah memberitahu PW1 bahawa defendan tiada apa-apa urusan dengan plaintif-plaintif. Begitu juga, PW2, yang diambil oleh PW1 bagi melakukan kerja-kerja tanah di ladang defendan, mengakui bahawa seorang Ah Seng adalah kontraktor utama di situ dan bahawa Ah Seng yang menjaga estet dan bahawa Ah Seng jugalah orangnya yang plaintif-plaintif perlu berurusan. Selain itu, PW2 telah mengeluarkan tiga bil atas arahan PW1 untuk dikemukakan ke mahkamah bagi maksud ad hoc prosiding mahkamah. Jelas bahawa hakim bicara telah gagal menilai sepenuhnya keterangan-keterangan yang dikemukakan di hadapannya. Ianya mengikut bahawa hakim bicara khilaf dalam dapatannya bahawa terdapat suatu perjanjian lisan di antara plaintif-plaintif dan defendan di mana kemungkinan keterangan yang dikemukakan tidak menyokong dapatan sedemikian.

[Tuntutan plaintif-plaintif ditolak dengan kos RM5,000. Deposit dikembalikan kepada defendan.]

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Hakim bicara betul dalam dapatannya bahawa terdapat suatu perjanjian lisan yang dimasuki oleh plaintif-plaintif (melalui PW1) dan defendan (melalui DW1). Hakim bicara berpeluang melihat kelakuan saksi-saksi. Beliau mendapati PW1 sebagai

seorang saksi yang boleh dipercayai dan telah memberikan alasan-alasan bagi dapatannya yang mana tidak harus diganggui. Dapatan-dapatannya bukanlah menyanggahi arus keterangan dan bukan juga bertentangan.

(2) Hakim bicara betul dalam dapatannya bahawa keterangan PW1 telah disokong oleh PW2 yang diambil untuk membuat kerja-kerja di ladang defendan selepas perjanjian lisan. Hakim bicara juga telah dengan teraturnya membuat rumusan bahawa terdapat keterangan dokumentari bahawa PW1 telah mengeluarkan perbelanjaan untuk menjalankan kerja-kerja di bawah perjanjian lisan. Hakim bicara betul dalam menggunapakai andaian di bawah s. 114(g) Akta Keterangan 1950 mengambilkira kegagalan defendan untuk memanggil TTK, pengarahnya pada waktu material, untuk memberi keterangan. Tiada penjelasan diberi dalam keterangan defendan mengapa TTK tidak dipanggil untuk memberi keterangan. TTK jelas merupakan saksi material defendan dan keterangannya adalah penting bagi defendan.

(3) Kontraktor-kontraktor yang didakwa DW1 sebagai telah diambil untuk menjalankan kerja-kerja penanaman semula tidak pernah dipanggil sebagai saksi untuk pembelaan. Bila disoalbalas mengenai perjanjian lisan, jawapan DW1 adalah sombong, tidak bertanggungjawab dan mengelak-elak.

(4) Hakim bicara betul dalam TIDAK memberi perhatian berat kepada keterangan DW2 atau kepada keterangan dokumentari yang dikemukakan olehnya atas alasan-alasan berikut: (a) tiada keterangan bahawa DW2 pernah melawat ladang defendan; (b) DW2 tidak pernah menemui PW1, TLS ataupun NBG; (c) DW2 tidak berada dalam keadaan untuk mengesahkan bahawa TLS atau NBG adalah kontraktor-kontraktor defendan atau bahawa mereka sebenarnya wujud; (d) DW2 secara peribadi tidak membuat bayaran kepada TLS atau NBG dan tidak juga mengeluarkan baucer-baucer mengizinkan bayaran kepada kedua-dua mereka; dan (e) DW2 secara implicit kelihatan telah mengakui semasa pemeriksaan balas bahawa terdapat berbagai ketidak-teraturan tentang cara beliau menguruskan hal-hal kewangan defendan berhubung dengan wang yang diserahkan kepada TTK untuk pembayaran kepada kontraktor-kontraktor.

A **(5)** Keterangan yang dikemukakan oleh DW2 tidak mempunyai nilai probatif memandangkan TTK, TLS dan NBG tidak pernah dipanggil sebagai saksi-saksi oleh defendan bagi menjelaskan peranan yang mereka mainkan dan sama ada mereka telah menerima wang yang didakwa dibayarkan oleh DW2.

B

(6) Berdasarkan fakta kes, hakim bicara telah memutuskan dengan betulnya bahawa kontrak lisan yang dibuat oleh TTK dengan PW1, sebagai suatu perkara undang-undang, telah mengikat defendan memandangkan kedudukan TTK sebagai pengarah
C defendan dan peranan yang dimainkan TTK dalam pengurusan ladang defendan. Kaedah dalam kes *Turquand* melindungi orang-orang luar yang berurusan dengan syarikat dengan tulus ikhlas. Mereka berhak membuat andaian bahawa perbuatan-perbuatan yang dirangkumi oleh perlembagaan dan kuasa-kuasa syarikat
D telah dilakukan dengan teratur dan tidak diperlukan untuk menyiasat sama ada perbuatan-perbuatan pengurusan dalaman adalah sebenarnya teratur. Dalam kes semasa, orang luar tersebut adalah PW1 dan beliau telah berurusan dengan pengarah defendan, TTK dengan tulus ikhlas.

E

(7) Pengemukaan keterangan PW1 oleh defendan bagi menunjukkan PW1 mengambil arahan dari dan bekerja dengan kontraktor lain adalah tersasul. Keterangan yang dikemukakan adalah bersifat selektif. Bilamana PW1 dalam pemeriksaan balas menyatakan
F bahawa beliau tidak mempunyai apa-apa perjanjian dengan defendan, beliau maksudkan bahawa beliau tidak mempunyai apa-apa perjanjian bertulis, kerana harus diingati bahawa PW1 adalah selamanya konsisten dengan pendiriannya bahawa terdapat perjanjian lisan di antara beliau (bagi pihak plaintif-
G plaintif) dan TTK (bagi pihak defendan).

(8) Berhubung dengan kesamaran dan ketidakupayaan perjanjian menjadi satu kontrak yang sah, keterangan PW1 menunjukkan bahawa terma-terma perjanjian lisan adalah agak jelas dan boleh menjadi suatu kontrak yang sah di bawah Akta Kontrak 1950.
H Obligasi-obligasi di pihak plaintif-plaintif adalah: (a) untuk menanam kelapa sawit atas 240 ekar tapak ladang; (b) untuk menanam semula kelapa sawit yang telah dimusnahkan oleh babi hutan di bahagian tapak ladang 240 yang satu lagi; (c) untuk menjalankan kerja-kerja penjagaan (termasuk pembersihan
I dan pembajaan) di keseluruhan 480 ekar tapak ladang; (d) untuk menanggung pembiayaan yang dibelanjakan bagi kerja-

kerja tersebut; (e) untuk mengembalikan kelapa sawit kepada defendan selepas tempoh sepuluh tahun; dan (f) untuk menjalankan kerja dengan serta merta. Obligasi di pihak defendan pula adalah untuk memberikan plaintif-plaintif hak untuk menuai buah-buah sawit di seluruh kawasan 480 ladang untuk tempoh sepuluh tahun sebagai balasan kepada perkhidmatan yang diberikan oleh plaintif-plaintif kepada defendan dan untuk menyediakan satu perjanjian bertulis secepat yang mungkin.

Case(s) referred to:

Eastern & Oriental Hotel [1951] Sdn. Bhd. v. Ellarlous George Fernandez & Anor & Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 FC ***(refd)***

Koh Jui Hiong & Ors v. Ki Tak Sang & Ors [2009] 10 CLJ 205 HC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

MBF Finance Bhd v. Sim Peng Bee & Anor [2003] 1 CLJ 690 HC ***(refd)***

Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***

Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 HC ***(refd)***

Tay Tong Chew & Anor v. Abu Rahman Hj Ahmad [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389 FC ***(refd)***

Tenaga Nasional Berhad (formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (formerly Perwaja Terengganu Sdn Bhd) [1995] 4 CLJ 670 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 30

Evidence Act 1950, ss. 101(1), (2), 114(g)

For the appellant/defendant - Chan Vy Sing (Lam Cheng Wun & Sakthy Vell with him); M/s Prasad Abraham & Assoc

For the respondents/plaintiffs - MJ Ganesan; M/s J Ganesan Tajul Anuar & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-22-305-2004]

Reported by Usha Thiagarajah

A

JUDGMENT

Low Hop Bing JCA:

Appeal

B **[1]** This appeal by the appellant ("the defendant") is lodged against the decision of the Kuala Lumpur High Court in allowing the claim of the respondents ("the plaintiffs") after a full trial.

[2] We heard the appeal on 31 May and 1 June 2010. By a
C majority judgment (Low Hop Bing and Zaharah bt Ibrahim JJCA concurring, and Mohd Hishamudin bin Mohd Yunus JCA dissenting), we allowed the appeal. We now give the grounds of the majority judgment.

Plaintiffs' Claim

D

[3] The plaintiffs are partners who have been carrying on the business of supplying tanker lorry services to carry latex from Kota in Negeri Sembilan to Port Klang in Selangor since 1987.

E **[4]** The plaintiffs' claim against the defendant is based on an oral contract in March 1999 with the defendant to replant, maintain and fertilize oil palm seedlings on 240 acres (Kawasan A) which was half the area of Estate No. 6 belonging to the defendant; and the plaintiffs were promised the right to harvest oil palm fruits on the
F 480 acres in the entire Estate No. 6 for ten years. Since there was no written contract, the plaintiffs stopped all works in October 2000 and sought to recover sums of money that they had purportedly spent in relation to Kawasan A, due to the defendant's breach of contract.

G

The Defence

[5] The defendant, the owner of Estate No. 6 measuring 480 acres in area, denied the existence of any contract with the plaintiffs, and averred that it had actually engaged other contractors
H *viz* Mr Ng Boon Geok and Mr Tan Leng Seong (Ah Seng) to do all oil palm seedlings replanting and field works such as spraying, road works, drainage, harvesting, pruning and manuring on the entire 480 acres of Estate No. 6.

I

Any Contract Between Plaintiffs And Defendant?

[6] It was submitted by defendant's learned counsel Mr Chan By Sing (Ms Lim Cheng Wun and Mr Sakthy Vell with him) that there was no contract between the plaintiffs and the defendant in relation to the replanting works carried out in Kawasan A of Estate No. 6.

[7] Plaintiffs' learned counsel Mr MJ Ganesan supported the learned trial judge's finding that there was an oral contract for the replanting works in Kawasan A to bind the parties.

[8] The learned trial judge traced the plaintiffs' case to 1995 when one Tan Tuan Kim of the defendant company was said to have approached Mr Suburamaniam (PW1) of the plaintiffs' firm and offered him (PW1) to do rubber tapping and latex collection in Estate No. 6 owned by the defendant. In return, PW1 agreed and paid a sum of RM10,000 per month to Tan Tuan Kim. There was no written agreement for rubber tapping and latex collection. The relationship was said to have continued until March 1999 when the said Tan Tuan Kim offered PW1 oil palm replanting works for 240 acres in Estate No. 6. In return, the plaintiffs were given the right to harvest the oil palm fruits from Estate No. 6 for a period of 10 years; and the assurance and promise that a proper written agreement would follow suit. In the meantime, besides replanting works, earthworks, ground levelling and construction of roads and culverts in Kawasan A were undertaken by the plaintiffs. The plaintiffs kept on pestering Tan Tuan Kim for the written agreement and made various trips to the defendant's office in Kuala Lumpur, but were unable to meet anybody. All along, Tan Tuan Kim and his brother Ah Seng were in the estate, supervising the plaintiffs' works. Soon, when the plaintiffs realized that Tan Tuan Kim has ceased coming to the estate, the plaintiffs stopped work in October 2000. One Cheong Pang Kwan (DW1), another director of the defendant company, used to come for fishing trips in the estate and was aware that the plaintiffs were doing work there. In carrying out the earthworks, the construction of roads and culverts and digging holes for the purpose of replanting oil palm seedlings in Kawasan A, the plaintiffs employed a subcontractor and other workers.

[9] On the other hand, against the plaintiffs' case, the learned trial judge referred to the defendant's rebuttal evidence adduced through DW1, the executive director of the defendant company.

DW1 confirmed that the defendant has a contract with one Lim Beng for latex collection up to 1994. In 1995, the defendant started embarking on replanting works in the entire Estate No. 6 including Kawasan A and appointed Ng Boon Geok and Tan Leng Seong as the main contractors to undertake the job. DW2, who corroborated DW1's evidence, testified that the culverts in Estate No. 6 were constructed by another contractor Goh Lai Pen and that Tan Tuan Kim was appointed as the manager for Estate No. 6. Tan Tuan Kim would issue requisitions for works done in Estate No. 6 for which payments were made by the defendant company. Various vouchers were tendered by DW2 to support the defendant's claim that the works done in Estate No. 6 were carried out by other contractors and not the plaintiffs.

[10] On the aforesaid evidence adduced for the plaintiffs and the defendant respectively, the learned trial judge found the plaintiffs' version to be more probable and allowed their claim against the defendant.

[11] Having regard to the submissions of learned counsel and, subsequently, the decision of the learned trial judge, we identified the issue for determination in the instant appeal as follows:

> On the evidence adduced at the trial, was there a legally binding contract between the plaintiffs and the defendant for the replanting of oil palm seedlings and other related works in Kawasan A of Estate No. 6?

[12] This is a question of mixed fact and law.

[13] The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant. Section 101(1) and (2) of the Evidence Act 1950 merit reproduction as follows:

> **101 Burden of proof**
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(See eg, *MBF Finance Bhd v. Sim Peng Bee & Anor* [2003] 1 CLJ 690; *Tenaga Nasional Berhad (formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 CLJ 670, *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307 and *Koh Jui Hiong & Ors v. Ki Tak Sang & Ors* [2009] 10 CLJ 205 HC).

[14] The learned trial judge had relied heavily on the alleged oral contract for rubber tapping and latex collection in support of an oral contract for replanting oil palm seedlings and related works. In relation to the oral contract for rubber tapping and latex collection, it is necessary for us to stress that the plaintiffs' evidence of the so-called payments of RM10,000 per month to Tan Tuan Kim, apparently for a period of four to five years ie, from 1995 to 1999 was not supported by a single document or receipt. The plaintiffs also did not call Tan Tuan Kim as their witness. If the payments had in fact been made, then the total amount paid for the period of four to five years ie, 48 to 60 months would have escalated to RM480,000 at the lowest, and RM600,000 at the highest. Surely, payments of such considerable sums, if true, would have been evidenced by receipts issued by Tan Tuan Kim. As there was not a single document or receipt to support such payments, purportedly made by the plaintiffs to Tan Tuan Kim, we are of the view that the probability of the plaintiffs' evidence is either doubtful or illusory.

[15] The evidence adduced for the plaintiffs must be further tested against the contemporaneous documentary evidence adduced for the defendant in the High Court: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA. Quite apart from that, the defendant had actually appointed one Lim Beng under a written agreement for latex collection (see exh. D13 at Tab 16 of the Core Bundle; and p. 96 of the appeal record and confirmed under cross examination at pp. 60 to 61 of the appeal record). (A reference hereinafter to a page is a reference to that page in the appeal record, unless otherwise stated). Given this situation, we would also adopt the approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119, ie, judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case: See also *Nuri Asia Sdn Bhd v. Fossis Corporation Sdn Bhd* [2006] 5 CLJ 307 HC and *Koh Jui Hiong @ Koa Jui Heong & Ors, supra*.

[16] Next, at p. 13, the learned trial judge had referred to the evidence adduced through DW1 for the defendant that there were indeed other contractors in Estate No. 6 doing oil palm replanting works, purchase of seedlings, manuring, etc from Jan 1999 till November 2001 which also included the period from March 1999 to October 2000, for which the plaintiffs were making their claim.

[17] The first plaintiff, Suburamaniam (PW1), in his evidence at pp. 50 and 51, has categorically agreed that there was no contract between the plaintiffs and the defendant. The relevant portion of the cross-examination of PW1 merits reproduction as follows:

> Question: I put it to you, Mr Suburamaniam, a general maintenance of the estate was done by Sang Lee's own contractors and not by you. Agree?
>
> Answer: I agree (p. 50)
>
> Question: I put it to you since there was no agreement between Sang Lee and you for the phase 2 replanting of oil palm, the issue of deployment of labour by you does not concern Sang Lee. You agree?
>
> Answer: I agree (p. 51)

[18] Further cross-examination of the first plaintiff (PW1) also led to his admission that he in fact did not have any contractual arrangement with the defendant (Sang Lee) and that he was actually instructed by other contractors to do works in Estate No. 6. P53 contains the following Questions and Answers:

> Question: I put it to you that you didn't have any contractual arrangement with Sang Lee.
>
> Answer: I don't have any agreement with them.
>
> Question: I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. Do you agree?
>
> Answer: Agree

[19] At p. 55, PW1 also admitted that he did indeed take instructions from Tan Leng Seong (Ah Seng) and that Ah Seng was the contractor who supervised the whole of the defendant's Estate. This evidence corroborates the testimony of DW1 and DW2 that the replanting works in the Estate had been contracted to other persons, not the plaintiffs who were at best sub-contractors.

[20] PW1 also admitted at p. 53 that when he approached DW1 for the first time during the latter's fishing trip, DW1 had told him (PW1) that the defendant had no dealings with the plaintiffs.

[21] The second plaintiff (PW2) had also categorically admitted that Ah Seng was the main contractor, as shown in the following evidence:

> Question: I put it to you, the Mr Ah Seng that you refer to (in) your answer was the main contractor doing work on the estate?
>
> Answer: Yes, I agree (p. 44)

[22] In fact, PW2 continued in his evidence that Ah Seng was the one who was taking care of the Estate and that Ah Seng was the one whom they have to deal with (p. 44).

[23] PW2 had admitted that he had issued three bills dated 15 July 2002 at the behest of Suburamaniam (the first plaintiff) who had told him (PW2) to do so, in order to tender in court for the ad hoc purpose of the proceedings in which PW1 had commenced the action against the defendant (Question and Answer 12 at p. 92).

[24] It is abundantly clear to us that there has been insufficient appreciation by the learned trial judge of the evidence, in particular, the evidence reproduced above, which was adduced before him.

[25] In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor, supra,* at p. 33, this court held that:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

[26] On appeal, in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC, the Federal Court at p. 320 held that the Court of Appeal had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. The Federal Court also affirmed that the phrase 'insufficient judicial appreciation of evidence' is consistent with the established "plainly wrong test".

[27] In line with the principle enunciated by the Federal Court in *Gan Yook Chin, supra*, we found it necessary to examine the process of evaluation of the evidence by the learned trial judge, which we have set out above. The learned trial judge's insufficient appreciation of the evidence adduced before him would warrant appellate intervention which we hereby do.

Conclusion

[28] The learned trial judge had erred in his finding that there was an oral agreement between the plaintiffs and the defendant when the probability of the evidence does not support such a finding. By majority, we allowed this appeal, set aside the judgment of the learned trial judge and substituted it with an order that the plaintiffs' claim be dismissed with costs of RM5,000. Deposit to be refunded to the defendant (the appellant).

Hishamudin Mohd Yunus JCA (dissenting):

[29] This is an appeal by the appellant (the defendant at the trial before the High Court) against the decision of the learned judge of the High Court of Kuala Lumpur given on 29 June 2009. The learned judge had allowed the respondents' (the plaintiffs at the trial before the High Court) claim against the appellant for breach of an oral contract, and had ordered that damages be assessed.

[30] I am dismissing this appeal with costs.

[31] I shall now give my grounds.

[32] In this judgment, the appellant will be referred to as the 'defendant', and the respondents will collectively be referred to as the 'plaintiff' (the partnership).

[33] The four plaintiffs are partners in a partnership firm known as Syarikat S.F.. They are bringing this action collectively as a partnership.

[34] The defendant is a company that has a registered office in Petaling Jaya with a business address at Jalan Tun H. S. Lee, Kuala Lumpur.

[35] The plaintiffs' claim against the defendant is for breach of an oral contract made between the partnership, through one of its partners, namely, the first plaintiff, Suburamaniam a/l Mayawan ('Suburamaniam'), and the defendant company through one of its directors, namely, one Tan Tuan Kim ('Tan'). This oral agreement is alleged to have been made in March 1999 between Suburamaniam and Tan.

[36] The main witness for the plaintiff is Suburamaniam himself. He testified in court as the plaintiffs' first witness (PW1). The following facts are established by his evidence.

[37] He was the partner of the plaintiffs' firm responsible for the management and operation of the partnership. The business premises of the partnership were located in a small town in Negeri Sembilan – the town of Kota, a town surrounded by rubber and oil palm estates. His firm provided lorry services transporting liquid latex from the rubber producing areas around Kota to places like Port Klang. His firm also managed the latex collection of rubber estates. The firm had two tanker lorries and employed about 10 to 15 regular employees. At times, should the need arise, his firm would employ foreign workers, namely, Indonesian and Indian contract workers in addition to the regular employees.

[38] The plaintiffs' business dealings with the defendant company first began in 1995. The defendant company owned a rubber estate near Kota. It was an estate with an area of some 480 acres. The rubber trees grown in the estate were old. The defendant company wanted to sell them and to plant in their place oil palm trees. So, in the early part of 1995, Tan (a director of the defendant company) approached Suburamaniam (a partner of the plaintiffs' partnership firm) and inquired as to whether the latter's firm would be interested to tap and collect the latex from the old rubber trees before they are felled in return for a cash payment (to the defendant

company) of RM10,000 per month. The latter agreed. So, the plaintiff tapped and collected the latex and the defendant company was paid RM10,000 per month.

[39] Subsequently, in the later part of 1997 the defendant company cut down the old rubber trees to make way for oil palm cultivation. Oil palm seedlings were planted on 240 acres of the estate. But some of the young oil palms planted were destroyed by wild boars.

[40] In March 1999 Tan approached Suburamaniam to ask whether he would be interested to plant oil palms in the remaining half area (that is to say, in the other 240 acres) of the estate, and also in those areas where the oil palms had already been planted by the defendant but were destroyed by wild boars; and also to undertake such further services as weeding, manuring and maintenance of the trees in the entire 480 acres for a period of ten years. In return for carrying out these services, the plaintiff would be given the right to harvest the fruits of the oil palms for a period of ten years in the entire 480 acres of the estate. After the ten-year period, the plaintiff would have to surrender the trees back to the defendant. Suburamaniam accepted the terms but asked that the oral agreement be put in writing. Tan agreed but Tan asked Suburamaniam to commence work immediately, and that he would in the meantime arrange for the written agreement to be prepared. He assured Suburamaniam that he would definitely prepare the written agreement.

[41] Given this assurance, Suburamaniam began his works immediately in March 1999. He bought 13,000 oil palm seedlings from a company called Applied Agricultural Research Sdn. Bhd. in Sungai Buloh costing RM26,490.75, and planted them on the 240 acres of the estate as well as in those areas in the other half of the estate where the oil palm trees had been destroyed by wild boars. To plant the oil palm seedlings, he deployed tractors, excavating machines and grader machines. He employed about 10 to 15 workers on a daily basis to carry out the works of planting, maintaining, watering and manuring. He was at the site daily to supervise the workers.

[42] But in carrying out his works, he found driving his vehicles on the estate roads to transport workers, seedlings and fertilizers difficult because of the poor drainage system. The rain caused soil erosions, and there were deep gullies on the roads. It was difficult

to manoeuvre the vehicles. In order to overcome this problem, there had to be a proper drainage system, and so Suburamaniam constructed 29 culverts to improve the drainage system.

[43] However, Tan, contrary to his assurance, did not prepare the written agreement. Whenever Suburamaniam reminded him about the written agreement, he would assure the latter that the defendant company would in due course prepare the written agreement. Tan also assured Suburamaniam that even without the written agreement the defendant would still honour the oral agreement, just as the defendant company had honoured the oral agreement made previously in 1995.

[44] Tan came to the estate many times a month to see that Suburamaniam carried out his works. On many occasions, when Tan came to the estate, Suburamaniam would ask Tan about the written agreement. He would ask Tan about 2 to 3 times a month about the written agreement.

[45] Subsequently, Suburamaniam observed that Tan ceased to come to the estate.

[46] When Suburamaniam saw that the written agreement was not forthcoming, and that Tan was no longer to be seen, he approached the executive director of the defendant company, one Cheong Pang Kwan (DW1), who used to come for fishing at a pond in the estate, to inquire about the written agreement. The pond was nearby Suburamaniam's nursery. But Suburamaniam was met with a rebuff: Cheong did not recognize his works. To Cheong, he or the defendant company had nothing to do with either Suburamaniam or the plaintiffs.

[47] Shocked by Cheong's reaction, Suburamaniam went to the defendant's headquarters in Kuala Lumpur to inquire about the written agreement. He tried to speak to the directors or to anyone at the office of the defendant, but was not allowed to see anyone there. He only managed to speak to the front office clerk. Undeterred, he made subsequent trips to the defendant's office but each time his effort was fruitless.

[48] By reason of the attitude of the defendant, Suburamaniam stopped all works at the end of October 2000.

[49] On 25 November 2002 the plaintiffs' solicitors issued a letter of demand to the defendant.

[50] In this writ action, the plaintiff is claiming against the defendant for the reimbursement of expenses incurred in carrying out works in the estate as a result of the oral agreement between Suburamaniam and the defendant.

[51] The judgment of the learned High Court Judge at this stage is only on the issue of liability: was there an oral contract between the plaintiff and the defendant; and, if there is, was there a breach of that oral contract?

[52] The learned judge ruled that there was an oral contract between the plaintiff and the defendant and that there was a breach of that oral contract. But the thrust of the judgment was more – and I think, rightly so – on the issue as to whether there was indeed an oral contract formed. For, if indeed an oral contract does exist, clearly, the defendant, by its conduct, has no intention of honouring the oral agreement.

[53] This is what the learned judge said:

a) The plaintiffs' version of the whole episode regarding the relationship between the parties is more probable in the light of the whole circumstances of the case. Besides, the evidence of the plaintiff is also corroborated by PW2 who testified that he was employed by the plaintiff to construct culverts and digging holes to plant oil palm seedlings at the defendant's estate between the months of June, July and August 1999. PW2 also testified that he used to see Tan Tuan Kim who was supervising the plaintiffs' work in the estate.

b) I also find the evidence of PW1 in respect of his meeting with DW1 in the estate during one of DW1's fishing trips to the estate and asking DW1 about the status of the agreement promised of him by the said Tan Tuan Kim to be credible. DW1 himself confirmed about this chance meeting and again, the plaintiffs' solicitors' letter of demand written to the defendant way back in November 2002 (D15) also lends support to this fact.

[54] In arriving at his findings, the learned judge invoked s. 114(g) of the Evidence Act 1950. This is what the learned judge said:

I am satisfied that the plaintiff has discharged its burden of proof on the balance of probabilities. The onus now is on the defendant to prove that the said Tan Tuan Kim possessed no such power or authority. The evidence of Tan Tuan Kim is certainly the best evidence which the court is entitled to. His evidence is all the more important to enlighten the court on exhibits D18 and D19 which were all purportedly issued and paid by the company upon his requisition while managing the estate. His evidence can also disprove the plaintiffs' claim as to the representations and promise he made on behalf of the company. Since his evidence is not forthcoming, it would under the circumstances of the case be appropriate for this court to draw an adverse inference under section 114(g) of the Evidence Act for the failure of the defendant to call him to testify.

[55] Section 114(g) of the Evidence Act provides:

114. Court may presume existence of certain fact

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[56] In my judgment, having examined the entire evidence of the parties, the learned High Court Judge was correct in his ruling that there was an oral contract formed between the plaintiff (through Suburamaniam) and the defendant (through Tan). The learned judge has had the opportunity of observing the demeanour of the witnesses, and he found Suburamaniam to be a credible witness, and he gives his reasons for his findings. Having examined the reasons given by the learned judge, I, as an appellate judge, should not disturb his findings. I do not think that his findings are against the weight of evidence or in anyway perverse. In the recent case of *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857 the Federal Court again reminded appellate courts that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour; and therefore unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge.

[57] In my view, in the present case, the learned judge is correct in his finding that the evidence of Suburamaniam was corroborated by one Suburamaniam a/l Samikannu (PW2). PW2 was a contractor engaged by Suburamaniam to do earth moving works in the defendant's estate when Suburamaniam started his works there after the oral agreement with Tan.

[58] The learned judge also appropriately made a finding that the documentary evidence, particularly, exhs. P2A-F, P7, P8A-B and P9A-C, tendered by Suburamaniam at the trial lends credence to his evidence that he had expended money to buy those things that he had claimed to have purchased for the purpose of carrying out the works under the oral contract.

[59] In my opinion, the learned trial judge was correct in invoking the presumption under s. 114(g) of the Evidence Act 1950 by reason of the failure of the defendant to call Tan, a director of the defendant at the material time, to give evidence. There is no explanation at all in the evidence of the defendant as to why Tan was not called to testify. Clearly Tan is a material witness for the defendant. Indeed, Tan's evidence is crucial to the defendant. For Tan is the very person that Suburamaniam claimed to have made the oral agreement with. Yet, for reasons best known to the defendant, Tan was not called. To my mind, this failure on the part of the defendant to call Tan is tantamount to the withholding of evidence. The presumption under s. 114(g) that ought to be made here is that, had Tan been called by the defendant, his evidence would have been unfavourable to the defendant (see *Tay Tong Chew & Anor. v. Abu Rahman Hj. Ahmad* [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389; *Eastern & Oriental Hotel [1951] Sdn. Bhd. v. Ellarlous George Fernandez & Anor. & Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; and *Guthrie Sdn. Bhd. v. Trans-Malaysian Leasing Corp. Bhd.* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155). Now, this issue of the learned Judge invoking the presumption under s. 114(g) is raised by the appellant in one of the grounds of appeal in its memorandum of appeal; however, remarkably, this issue does not appear to have been addressed by the appellant's learned counsel in his written submission.

[60] The main witness for the defence is Cheong Pang Kwan (DW1) the Executive Director of the defendant. He said that the defendant never employed Suburamaniam to do the works as

claimed by the latter. He said that his company had engaged other contractors to carry out the replanting works, and that they were Ng Boon Geok and Tan Leng Siong. But these two persons were never called as witnesses for the defence; and, as I have pointed out a moment ago, neither was Tan Tuan Kim ('Tan'), the defendant's own director called. And when DW1 was crossed-examined about the alleged oral agreement between Tan and Suburamaniam, bearing in mind that DW1 was the executive director of the defendant company, his answers were arrogant, irresponsible and evasive. I shall illustrate by referring to the following evidence given by DW1 during cross-examination:

Q: You also said in your answer that one of the plaintiffs ... Is it Mr. Suburamaniam who is making the claims here?

A: That's right

Q: Was he one of the persons who were there?

A: I believe he is.

Q: What did he ask you?

A: He started on some estate work that he purportedly has done. But I told him I don't know who you are and I have not given any contract work to you.

Q: And then what was his reaction? How did he react to your answer?

A: I can't recall because I did not want to keep on at it because it was ... I had guest there and we were having rest and recreation at the point of time.

Q: Was Mr. Tan Tuan Kim another director around that place during/around the time?

A: I can't recall whether at that point in time he was around.

Q: Did you check with him what is this Indian man coming and asking about ... why didn't you ask?

A: Why should I?

Q: It is your estate, you are fishing, somebody is coming confronting you with a contract works and you are the executive director. You just couldn't be bothered about it? Is it?

A: I know that I had not employed any person such a person to do any of my contracting work.

Q: Did you ask Mr. Tan Tuan Kim about this Indian man coming and asking you what is happening to my contract? Did you ask him?

A: I can't recall.

[61] Apart from DW1, the defendant also called another director of the defendant company, Siew Kum Kooi (DW2), to be its witness. DW2 had been a director of the defendant since 1995. DW2 was responsible for the general administration of the defendant company. He looked after the accounts of the company and kept track of payments made to the creditors of the company. He was in charge of files in which the company's vouchers and invoices were kept. He also prepared the monthly summary of payments made by the company in respect of estates owned by the defendant. He said that in 1999 replanting and manuring works in the estate were done by two contractors, namely, Tan Leng Siong and Ng Boon Geok. He said road works and culverts were also done by the same two contractors. He said no vouchers were ever issued in the name of Syarikat S. F..

[62] In my judgment, the learned High Court Judge was right in not giving much weight to the evidence of DW2 or to the documentary evidence adduced by him. Firstly, there is no evidence that DW2 ever visited the estate. Indeed, he had never met Suburamaniam. He also had never met either Tan Leng Siong or Ng Boon Geok, who the defendant claims to be its contractors. He was in no position to confirm that Tan Leng Siong and Ng Boon Geok were contractors of the defendant; or that these two persons in fact did exist. He just relied on the information provided to him by Tan. He personally had never made any payment either to Tan Leng Siong or to Ng Boon Geok. He had never issued any vouchers authorizing payments to either Tan Leng Siong or Ng Boon Geok. All he did was simply to give empty vouchers and cash to Tan to effect payments (supposedly) to Tan Leng Siong and Ng Boon Geok. Tan would fill in the vouchers and would get the contractors in question to sign the vouchers; and he would then forward the signed vouchers to DW2. DW2 in cross-examination appears to have impliedly admitted that there were irregularities in

his handling of the financial matters of the company with regard monies handed to Tan for payments (supposedly) to contractors. Since Tan, Tan Leng Siong and Ng Boon Geok were never called as witnesses by the defendant to explain exactly what role they played, and whether they ever received the monies allegedly paid out by DW2, the evidence (including the documentary evidence) adduced by the DW2 is hardly of any probative value.

[63] The appellant in its memorandum of appeal contends that as a matter of law any representation made by Tan to Suburamaniam was incapable of binding the defendant company. However, before this court this issue again was not raised in the written submission of the learned counsel for the appellant. Be that as it may, the learned High Court Judge addressed this issue in his grounds of judgment. It is as follows:

> In the circumstances of the case, it is logical and reasonable for the plaintiff to rely on the representation and promise of Tan Tuan Kim. Any reasonable man would assume that a man in that position and function would have the authority and power to act on behalf of the company. Tan Tuan Kim represents the company. It is not the business of the plaintiff and PW1 has no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with. Outsiders dealing with the company in good faith are entitled to assume that acts within the company's constitution and powers have been properly performed. And are not bound to inquire whether acts of internal management have been regular. A corporation like the defendant is an abstraction. It has no mind of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent. That person maybe the board of directors itself or may be someone that has an authority to coordinate with the board of directors. (See: *Pekan Nenas Industries Sdn. Bhd. v. Chang Chin Chuen* [1998] 1 CLJ 793; *Leonard Carrying Company Ltd v. Asiatic Petroleum Company Ltd* [1915] AC 705; and *Royal British Bank v. Turquand* [1856] 119 ER 886). Tan Tuan Kim was such a person.
>
> (f) Whether a director or a person is authorized either expressly or impliedly to make representation on the company's behalf depends very much on the facts and circumstances of the case. It also depends on the authority of the said person to make that representation. For such representation to be binding on the company, it must be established that the director and in this case the said Tan Tuan Kim, had the authority to enter on behalf of the

company into a contract of the kind sought to be enforced. Secondly such representation was made by a person who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates. Thirdly, the contractor, in this case the plaintiff, was induced by such representation to enter into the contract and fourthly, the memorandum or articles of association of the defendant company gives the company the capacity either to enter into a contract of that kind sought to be enforced or to delegate authority to enter into a contract of that kind to the said Mr. Tan Tuan Kim. (See: *Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor* [1964] 2 QB 480; Chan & Koh on *Malaysia Company Law, Principles & Practice,* 2nd edn. p. 152).

I find all these four features are present as to hold that the representation and promise made by the said Tan Tuan Kim to the plaintiff will bind the company. The company is aware of the powers and acts of Tan Tuan Kim as the manager of the estate. DW2 in his evidence says, all the payments made through the vouchers are based on requisitions made by Tan Tuan Kim. Everything in the running of the estate was left solely in the care and management of the said Tan Tuan Kim. By so permitting the said Mr. Tan Tuan Kim to act in that manner in the conduct of its principal business with the plaintiff, the company represents to the world that Tan Tuan Kim had the authority.

[64] To put it briefly, the learned judge takes the view that, considering the position of Tan in the defendant company (a director) and the role he played in the management of the estate, the oral contract that Tan made with the plaintiff, in his capacity as a director of the defendant company, as a matter of law, binds the defendant company. In my judgment, this view of the learned judge, on the facts of the case, is correct in principle. The rule in *Turquand*'s case protects outsiders dealing with a company in good faith who are entitled to assume that acts within the constitution and powers of the company have been properly performed, and are not bound to inquire whether acts of internal management have been regular. In the present case, the outsider is Suburamaniam, and he had been dealing with Tan, as a director of the defendant company, in good faith.

[65] In his written submission, the learned counsel for the appellant refers to the following evidence of Suburamaniam given during cross-examination:

Q: I put it to you that you didn't have any contractual arrangement with Sang Lee. A

A: I don't have any agreement with them.

Q: I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. You agree? B

A: Agree.

[66] Having referred to the above evidence, the learned counsel submits that the above evidence shows that Suburamaniam took instructions and worked for other contractors, and hence there was no oral contract between the plaintiff and the defendant. C

[67] With respect, at the outset, I have to point out that the above presentation of the evidence of Suburamaniam by the leaned counsel for the appellant is misleading. Firstly, the second question put to Suburamaniam did not immediately follow the first question put to him. There was in fact another question put to Suburamaniam in between the above two questions, which has been omitted by the learned counsel. The question in between is this: D

E

Q: You don't have any arrangement with Sang Lee not whether written or not you don't have any contractual dealings with Sang Lee.

A: I don't agree.

F

[68] Secondly, in order to assess fairly the evidence of Suburamaniam, we must not be selective on the evidence. We must view his evidence in the proper perspective and this means that we have to consider the other evidence of Suburamaniam. In other words, we have to examine his evidence in a wider context. Actually, what Suburamaniam said in cross-examination is this: G

Q: I put it to you that you didn't have any contractual arrangement with Sang Lee.

A: I don't have any agreement with them. H

Q: You don't have any arrangement with Sang Lee not whether written or not you don't have any contractual dealings with Sang Lee.

A: I don't agree. I

Q: I put it to you that you are actually instructed to do whatever work you did on Sang Lee by other contractors. You agree?

A: Agree.

Q: I put it to you further that Mr, Ah Seng was one of those contractors. You agree?

A: I don't agree.

Q: I put it to you when you first met Cheong Phang Kwan fishing at the Sang Lee estate you first met him, he made it clear to you that Sang Lee had no dealings with you. You agree?

A: I agree.

Q: I refer you to last question 20. I put it to you that the Sang Lee never appointed you as their contractor for the replanting of oil palm exercise.

A: I don't agree.

[69] Therefore, when Suburamaniam said in cross-examination that:

A: I don't have any agreement with them.

he cannot be taken to have meant that he did not have any agreement at all with the defendant. What he meant is that he did not have any written agreement with the defendant, and this is a fact. If Suburamaniam's evidence is examined in its proper perspective, one could easily appreciate that he was throughout consistent in his stand: that there was indeed an oral agreement between him (on behalf of the plaintiff) and Tan (on behalf of the defendant). With respect, I fail to see the logic of the defendant's reasoning that just because Suburamaniam admitted taking instructions from contractors appointed by the defendant, therefore, it must follow that there could not have been an oral contract between him and Tan; or that he had lied about the existence of the oral agreement between him and Tan. In the first place, considering that Suburamaniam had made a direct allegation and had given direct evidence that the person with whom he had made the oral agreement was Tan, I must say that I am unable to understand as to why the defendant has to take an indirect approach in its endeavour to prove the non-existence of the oral contract between Suburamaniam and Tan by adducing evidence about the existence of 'other contractors' in the estate appointed to do replanting works, when the defendant could have easily adduced

direct evidence of the non-existence of the oral contract between Suburamaniam and Tan simply by just calling Tan, the defendant's own director. And this brings us back to the perplexing question: why was Tan not called as a witness by the defendant?

[70] Finally, there is the argument raised by the appellant that the terms of the alleged oral agreement between Suburamaniam and Tan are vague and therefore are incapable of constituting a valid contract, citing s. 30 of the Contracts Act 1950. Although this is an issue that does not appear to have been raised in the memorandum of appeal, nonetheless, I shall deal with it. With respect, in my judgment, based on the evidence of Suburamaniam, the terms of the oral agreement between Suburamaniam and Tan, are quite clear, and are capable of constituting a valid contract under the Contracts Act 1950. The obligations on the part of the plaintiff are as follows: (1) to plant oil palms on 240 acres of the estate; (2) to replant oil palms that had been destroyed by wild boars in the other 240 acres of the estate; (3) to carry out maintenance works (including weeding and manuring) on the oil palms in the entire 480 acres of the estate; (4) to bear the expenses incurred for the aforesaid works; (5) and to surrender the oil palm trees to the defendant after ten years; (6) to carry out the works immediately. The obligations on the part of the defendant are (1) to give the plaintiff the right to harvest the fruits of the oil palms of the entire 480 acres of the estate for a period of ten years, in return for the services rendered by the plaintiff to the defendant; and to prepare a written agreement as soon as possible.

[Appeal dismissed with costs; the order of the High Court affirmed]